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Supreme Court, U.S.
FILED

No. 05-328 FEB 5 - 2005

OFFICE OF THE CLERK

In The
Supreme Court of the United States

LEON C. BAKER P.C., and LEON C. BAKER,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an Alabama court enjoin proceedings in a Florida court?

2. May an Alabama court enjoin an arbitration in Florida ordered by a Florida court?

3. Is the ruling of this Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), that arbitrators and not courts should rule on affirmative defenses to claims in arbitration, limited to defenses in the nature of the statute of limitations?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Leon Baker P.C. ("the P.C.") is a New York professional corporation, authorized to practice law in that state. All of its shares are owned by Leon C. Baker ("Baker"), a lawyer authorized to practice in New York and Florida. The P.C. is not authorized to practice law in Florida or Alabama.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Alabama Supreme Court affirmed the injunction. No opinions were issued by the Alabama trial court or by the Alabama Supreme Court. Three of the nine justices of the Alabama Supreme Court, however, dissented, but also without any opinions. Copies of the Alabama trial court and Alabama Supreme Court Orders are set forth commencing at Page App. 1 of the Appendix.

STATEMENT OF THE BASIS OF JURISDICTION

The decision of the Alabama Supreme Court was released on December 17, 2004 and received by P.C.'s counsel by mail on December 20, 2004. This petition was filed less than ninety days after the release of the Alabama Supreme Court's decision.

The Agreement between the P.C. and Merrill Lynch containing the arbitration provision relates, among other transactions, to the trading of stocks and other securities on exchanges engaged in interstate and foreign commerce. The Federal Arbitration Act (9 U.S.C. § 2) applies to the arbitration agreement in this case.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL

U.S. Const. art. I, § 8, cl. 3, provides in pertinent part:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. IV, § 1, provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.

STATUTORY

Federal Arbitration Act

> 9 U.S.C. § 2: Validity, Irrevocability, and Enforcement of Agreements to Arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

The P.C. opened a securities brokerage account with Merrill Lynch's Miami, Florida office. It signed Merrill Lynch's standard form of brokerage agreement, which provides that all disputes between the parties they cannot resolve shall be submitted to binding arbitration.

Many years later a dispute arose which the parties were unable to resolve. The P.C. sued Merrill Lynch in a Florida court, but when reminded of the arbitration provision, the P.C. agreed to the Florida court's entry of an order demanded by Merrill Lynch providing for arbitration. The Florida court reserved jurisdiction to enforce the award of the arbitrators and as to any other matters which might arise with respect to the arbitration.

As noted above, the P.C. and Merrill Lynch went forward with the arbitration as ordered by the Florida court to the point of trial. Then Merrill Lynch had second thoughts. It no longer wanted the dispute resolved by arbitration nor to have it tried in Florida. Merrill Lynch went to Alabama and obtained an injunction against the arbitration ordered by the Florida court. Merrill Lynch asserted 1) that it had an affirmative defense of res judicata[1] to the P.C.'s arbitration claim and 2) that such a defense should be ruled on by a court. These events transpired before this Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

In *Howsam*, this Court barred the intervention by courts to rule on alleged affirmative defenses in disputes

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[1] Actually the supposed "defense" would be collateral estoppel, not res judicata. Moreover, the P.C. was not a party to the proceeding in which the "defense" was alleged to have arisen and is not bound by it, whichever it might be.

which the parties have agreed to submit to arbitration. This Court subsequently denied the P.C.'s prior petition for certiorari to the Alabama Supreme Court, apparently because *Howsam* had resolved the principal legal issue that the P.C.'s earlier petition had raised.

In fact, however, the issue is far from resolved, because Merrill Lynch will not take "No" for an answer. It reads the decision in *Howsam* as very narrow, so narrow that *Howsam* would not apply to this case (or too many others either). Merrill Lynch asserts that *Howsam* is restricted to the very unusual type of defense which was before this Court in *Howsam*, based on a rule of the National Association of Securities Dealers, not a statute.

In arguing that *Howsam* is limited to precisely that type of defense, Merrill Lynch ignores that in *Howsam* this Court cited its earlier decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), which specified as among defenses to be ruled on by arbitrators "waiver, delay or a like defense." Merrill Lynch also disregards that in *Howsam* this Court cited, with approval, the Revised Uniform Arbitration Act of 2002, RUAA § 6(c), and comment 2, 7 U.L.A. 12-13 (Supp. 2002), which specifies that arbitrators should rule on affirmative defenses "such as time limits, notice, laches, estoppel and other conditions precedent." This issue as to the breadth of *Howsam* is common to both this petition and the related petition styled *Leon C. Baker P.C. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, on petition from a Writ of Certiorari to the Fourth District Court of Appeal of the State of Florida.

REASONS FOR GRANTING THE WRIT

Petitioners, Leon C. Baker, P.C. ("the P.C.") and Leon C. Baker ("Baker"), pray that a Writ of Certiorari be issued to review a judgment of the Supreme Court of Alabama which became final on December 17, 2004. (*See* App. 1).

This is the second Petition for Writ of Certiorari in this case. The earlier petition was filed more than two years ago. Shortly after the prior petition was filed, the major issue it raised was resolved favorably to petitioners' contentions, but in another case. That case was *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79 (2002), in which this Court ruled that arbitrators, and not courts, should rule on affirmative defenses to claims the parties have agreed to submit to arbitration. Since the issue had been ruled on, certiorari then appeared unnecessary in petitioners' case.

There remained, however, a different unresolved issue. The P.C. and Respondent, Merrill Lynch, had submitted their dispute to arbitration in Florida pursuant to an order of a Florida court.

The parties had, in Florida, exchanged pleadings and selected a panel of three lawyers as arbitrators. Just before the Florida arbitration trial was to go forward, however, Merrill Lynch unilaterally obtained from an Alabama court an injunction enjoining the arbitration the Florida court had ordered. As is set forth below, this is the Full Faith and Credit issue presented by this petition.

I. THE RELATED PETITION FOR CERTIORARI

This case is closely related to an earlier case solely between the P.C. and Merrill Lynch, in which Merrill

Lynch did not join petitioner Baker as a party. In that case a Petition for Writ of Certiorari to a Florida court was filed with this Court on December 28, 2004. Merrill Lynch has not yet responded to that earlier petition.

There are two separate cases, because Merrill Lynch in midstream changed its mind as to where and how this dispute should be litigated. Initially Merrill Lynch demanded arbitration in Florida, to which the P.C. consented. As was set forth above, however, on the eve of trial in the Florida arbitration, Merrill Lynch obtained in Alabama an injunction terminating the Florida arbitration it had demanded earlier.

The *Howsam* decision should have resolved both the Florida and Alabama cases and left the decision up to the arbitrators. It did not, because Merrill Lynch managed to persuade courts in both states (with three dissents in the Alabama Supreme Court) that this Court's decision in *Howsam* is much narrower than it really is. (*See* App. 1-App. 5).

Merrill Lynch insists that *Howsam* is limited to "defenses in the nature of the statute of limitations." What Merrill Lynch means by this phraseology is that the limitation in *Howsam* was not actually a statutory limitation but only a provision in the arbitration rules of the National Association of Securities Dealers ("NASD"). The parties in *Howsam* had agreed to the rule when they chose the NASD as the arbitrator. Hence, Merrill Lynch concludes, correctly, that the NASD rule in *Howsam* was only a contractual defense, *i.e.*, a "defense in the nature of the statute of limitations." Merrill Lynch is wrong, however, in asserting that *Howsam* does not apply to other affirmative defenses to a claim in arbitration. This issue is common to

both petitions, but the full faith and credit issue is raised only by this petition.

II. POST-*HOWSAM* PROCEEDINGS IN FLORIDA AND ALABAMA

After this Court's decision in *Howsam*, the P.C. returned to the Florida court which had ordered arbitration. The judge who had ordered arbitration, however, was not available, and the case was assigned to another judge who had no knowledge of the prior proceedings. He ruled erroneously 1) that this Court's denial of the P.C.'s Petition for a Writ of Certiorari was a ruling against the P.C. on the merits and 2) that, not withstanding this Court's decision in *Howsam*, the Alabama injunction is res judicata and cannot be disregarded or modified.[3]

III. THE FLORIDA COURT, NOT THE P.C., IGNORED THE ALABAMA INJUNCTION

At the urging of Merrill Lynch, the Alabama court ordered the P.C. to withdraw the Florida case. Although the P.C. believed that the Alabama court had no authority to interfere with the Florida proceedings, to avoid being held in contempt in Alabama, the P.C. requested that the Florida court dismiss the proceedings there.

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[3] In fact, both Florida and Alabama follow the general rule that an injunction, like other decrees in equity, can and should be modified or set aside when there has been a change in relevant law. *See Reynolds v. State ex rel. Wallace*, 279 Ala. 331, 185 So. 2d 123 (1966); *Jackson v. J.M. Lee as Comptroller of the State of Florida*, 150 Fla. 232, 7 So. 2d 143 (1942).

The Florida court, however, apparently recognizing that the Alabama order was an invalid attempt to intervene in the Florida case, ignored the P.C.'s involuntary request. The Alabama court then purported, on its own, to enjoin the Florida proceedings. The P.C. appealed to the Alabama Supreme Court. (*See* App. 2-4).

IV. IMPORTANCE OF THE ISSUES PRESENTED IN THIS PETITION

Thirty six years ago Justice Ginsburg, then a professor of law, said:

> The problem of the recognition due to a stay order, or an antisuit injunction, outside the forum that rendered it remains unresolved and is among the most troublesome of open issues in the area of full faith and credit to judgments.

Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 808 (1969). Nineteen years later, the issue remained unresolved. In *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 236 n.9 (1998), the Court declared:

> This Court has held it impermissible for a state court to enjoin a party from proceeding in a federal court . . . but has not yet ruled on the credit to be given to a state court injunction barring a party from maintaining litigation in another state.

One hundred thirty-nine (139) years earlier, in *Peck v. Jenness*, 48 U.S. 612 (1849), this Court had addressed the issue of interference by a court in proceedings in another court, but only as a matter of general common law. The

full faith and credit clause did not apply because the issue arose in a federal bankruptcy court, to which that provision was inapplicable. Nevertheless, the reasoning of the Court in *Peck* is plainly applicable to the circumstances of this case. This Court said:

> It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that ... right cannot be arrested or taken away by proceedings in another court.

Peck, 48 U.S. at 624-25.

This Court continued:

> These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they [dare] to proceed in the other.

Peck, 48 U.S. at 625.

Peck sets forth common law and equity principles based on indisputably sound legal reasoning. Beyond that, however, this Court recognized that a prohibition against enjoining proceedings in another court is a "necessity" in any legal system, especially in a federal system such as our own. Otherwise courts could deadlock by enjoining one another. Article IV of the United States Constitution, which requires states to give Full Faith and Credit to the "judicial proceedings of every other State," only makes

mandatory what logic prescribes. *See* U.S. Const. art. IV, § 1.

When the arbitration ordered by the Florida court was about to proceed to trial, Merrill Lynch ran off to Alabama to obtain an injunction contradicting the order of the Florida court. Did the Alabama court fail to give Full Faith and Credit to the order of the Florida court? This case poses precisely that long-standing issue – an issue central to the administration of the Full Faith and Credit provision of the United States Constitution.

A closely related inquiry is whether someone in the position of the P.C. and Baker should be held in contempt and punished for not complying with an order of the Alabama courts that interferes with a proceeding of the Florida court? It is no answer that the Alabama injunction is not directed to the Florida court but to the petitioners, the P.C. and Baker. Courts do not act on their own initiative. They rule on what the parties present to them. If the parties are enjoined, in effect so is the court. This Court dealt specifically with the subject in *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964), when it said:

> The fact, therefore, that an injunction issues only to the parties before the court, and not the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise power over a party who is a litigant in another and independent forum.

Similarly, in *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940), this Court said:

> That the injunction was a restraint of the parties and was not formally directed against the state court itself is immaterial.

In the present case, the Alabama trial court went through the motions of directing its injunction to the parties rather than the Florida court. It ordered the P.C. and Baker to withdraw the Florida case. The Florida court properly disregarded their "request to withdraw."

Without any opinion, the Alabama trial court then held the P.C. and Baker in contempt. (*See* App. 2-4). The Alabama Supreme Court, again without any opinion, affirmed, but with three justices dissenting, also without any opinion. (*See* App. 1).

This petition, therefore, addresses an issue on which this Court has not yet previously ruled: Under what circumstances, if any, may a state court intervene directly in a judicial proceeding in another state? Petitioners submit that the Full Faith and Credit provision of the United States Constitution provides the answer: Never.

The drafters of the Constitution had fought a war against interference in the former colonies by England, their "mother" state. They wanted no more of that. When independence was declared, the colonies became fully sovereign states except to the extent they had limited their sovereignty in the Articles of Confederation. At that time none of the states had the power, much less the right, to intervene in a judicial proceeding in another state.

When the Constitution superseded the Articles, the sovereignty of the states was further limited, but they also gained rights which sovereign states do not usually have. Article IV, Section 1 of the Constitution requires that the states' "public Acts, Records and judicial proceedings" be given "Full Faith and Credit" in the other states. *See* U.S. Const. art. IV, § 1. But that entitlement is coupled with a reciprocal obligation which sovereigns do not otherwise

have – to give Full Faith and Credit to "public Acts, Records, and judicial proceedings" of other states.

When Florida and Alabama became states, they assumed all of the obligations and gained all of the rights of the original thirteen. Among those rights and obligations is Florida's right to be free from interference in its legal proceedings and Alabama's obligation not to interfere with legal proceedings in other states. Before then they were merely matters of common law comity between independent states. They became rights and obligations by virtue of the Full Faith and Credit provisions of the Constitution. The Alabama injunction, therefore, is not merely a matter of improper interference in legal proceedings in another state. It is an unconstitutional denial of respect for judicial proceedings in Florida.

V. WIDER IMPLICATIONS OF THE FULL FAITH AND CREDIT ISSUE

A computer search shows that in the 215 years since the Constitution went into effect in 1789, this Court has issued 398 opinions in cases in which Full Faith and Credit was an issue. That is an average of almost two decisions per year.

Moreover, approximately 70% of the 398 rulings were in the twentieth century, an annual average of 2.8 decisions.[3] Yet, these statistics understate the importance of according Full Faith and Credit to the laws of the individual states.

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[3] The numbers of full faith and credit cases in other courts are equally impressive: 1503 in the federal courts of appeals, 1802 in federal district courts and 11,009 in state courts. The source, Loislaw, does not specify how many of the 11,009 state cases were appeals.

Advances in technology in the twentieth century have converted interstate transactions from the rarities they were in 1789 to commonplace, or even predominant, events in 2003. Mobility of individuals from state to state has created problems the drafters of the Constitution could not have imagined.

A harbinger of the litigation to come on full faith and credit issues was *Andrews v. Andrews*, 188 U.S. 14 (1903). Massachusetts courts refused to give effect to a South Dakota divorce entered on consent of both spouses, because neither was a resident of South Dakota. This Court affirmed, three justices dissenting. In the next 45 years, there was a litigation explosion of cases in which plaintiffs sought injunctions against their spouses' efforts to procure divorces in amenable other states.

Forty five years later, in *Sherrer v. Sherrer*, 334 U.S. 343 (1948), this Court declared:

> Insofar as the rule of that case [*Andrews*] may be said to be inconsistent with judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court.

In a footnote to their dissenting opinion in *Sherrer v. Sherrer*, Justices Frankfurter and Murphy noted:

> Today's decision would also seem to render invalid, under the Full Faith and Credit Clause, a large proportion of the commonly encountered injunctions against a domiciliary prosecuting an out-of-state divorce action.

Sherrer, 334 U.S. at 362.

There is an important lesson in what occurred in the 45 years between the decision in *Andrews* and its abrogation in *Sherrer*. If proceedings in other states may be enjoined, they will be. There were in those years "commonly encountered injunctions" against out-of-state divorce actions. This Court's cure was the requirement that courts give Full Faith and Credit to out-of-state divorce proceedings in which the applicant had met reasonable residence requirements. Similarly, unless the Alabama injunction in this case is vacated, some litigators may conclude that obtaining an out-of-state injunction may be a quicker and cheaper remedy (with perhaps, better odds of success) than a petition for certiorari to this Court.

This lawsuit presents an egregious example of failure to give full faith and credit. Alabama courts enjoined judicial proceedings in Florida even though Article IV of the Constitution commanded them to honor the Florida Proceedings. If that provision does not prohibit direct interference by an Alabama court in a Florida lawsuit, what would prevent the Florida court from responding with an injunction of its own against interference by the Alabama court in the Florida proceeding?

The prospect of state courts intervening in court proceedings in other states – even possibly counter injunctions by courts enjoining each other – is an exceedingly undesirable one. Fortunately, this court foreclosed any such possibility more than 150 years ago in *Peck*. That decision was well reasoned, and it remains a conclusive precedent against the drastic change Merrill Lynch has obtained in the Alabama courts. The practical consequence of permitting state courts to issue interstate cross injunctions would be nothing less than the judicial chaos which

the full faith and credit clause of the Constitution was wisely designed to avert.

VI. THE OTHER GROUND FOR CERTIORARI IN THIS CASE

The second issue in this case – Merrill Lynch's contention that this Court's decision in *Howsam* is narrowly restricted to "defenses in the nature of the statute of limitations" – does not raise a constitutional question. Nevertheless it presents a calculated misinterpretation of a federal statute, the Federal Arbitration Act, 9 U.S.C. § 2, on which this Court's correction is needed.

Merrill Lynch's insistence that *Howsam* applies only to the tiny class of defenses which Merrill Lynch characterizes as "in the nature of the statute of limitations" is an effort to undermine this Court's decision in *Howsam* that *all* affirmative defenses to claims in arbitration are to be ruled on by the arbitrators, not by courts.

Merrill Lynch's so far successful effort to eviscerate this Court's ruling in *Howsam* is less egregious only in the sense that errors in interpreting a statute are more easily corrected. Nevertheless, the issue has arisen in this case inextricably coupled with a constitutional error which cannot be corrected by legislation.

CONCLUSION

This petition for certiorari and the related petition for certiorari in the Florida case should be granted, and the two cases should be consolidated for hearing.

Respectfully submitted,

DAVID R. DONALDSON
Attorney for Petitioners

Of Counsel:
ARTHUR R. MILLER

RELEASED

Dec 17 2004

CLERK

SUPREME COURT OF ALABAMA

STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 2004-2005

1031020

Leon C. Baker and Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. (Appeal from Jefferson Circuit Court: CV-00-2000.1).

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Nabers, C.J., and Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Houston, See, and Lyons, JJ., dissent.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC., **Plaintiff,** **v.** **LEON C. BAKER, and LEON C. BAKER P.C.,** **Defendants.**	**Civil Action Number: CV-00-2000.01** **NOTICE OF HEARING: December 16, 2003 at 8:30 a.m.**

MOTION TO DISSOLVE PERMANENT INJUNCTION

(Filed Oct. 27, 2003)

COME NOW defendants Leon C. Baker ("Baker") and Leon C. Baker P.C. (the "P.C.") and move this honorable court to dissolve the Permanent Injunction entered against them on May 23, 2000. As grounds for this motion, Baker and the P.C. state as follows:

1. An injunction issued by a court imposes a continuing obligation upon the party enjoined and a court maintains jurisdiction for the life of the decree. *Wilkinson v. State*, 396 So.2d 86, 88 (Ala. 1981). The Alabama Supreme Court in *Wilkinson v. State* stated that a change in law may work to dissolve an injunction. *See Wilkinson*, 396 So.2d at 88.

2. The United States Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123

DENIED

Helen Shores Lee 3/9/04

S.Ct. 588, 154 L.Ed.2d 491 (2002) changed the law upon which the trial court relied when it initially imposed the permanent injunction. The *Howsam* decision established that when parties have agreed to submit all of their disputes to arbitration, arbitrators, not courts, have subject matter jurisdiction to rule on alleged affirmative defenses. This change in law requires that Merrill Lynch's collateral estoppel defense should be decided by an arbitrator.

3. The *Howsam* decision also established that the trial court does not have subject jurisdiction over the dispute. The permanent injunction against Baker and the P.C. is no longer valid. Thus, Baker and the P.C. should no longer be permanently enjoined by this Court.

Respectfully submitted,

/s/ J. Dawn Stith
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J. DAWN STITH
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NOTICE OF HEARING

PLEASE TAKE NOTICE that hearing on the above motion will be held before Judge Helen Shores

Lee of this Honorable Court on December 16, 2003 at 8:30 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon the below listed party by first class mail on this the 27th day of October, 2003:

Carl S. Burkhalter, Esq.
R. Allen Kilgore, Jr., Esq.
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/s/ J. Dawn Stith
OF COUNSEL

[SEAL] **IN THE SUPREME COURT OF ALABAMA**

December 16, 2004

1031020
Leon C. Baker and Leon C. Baker, P.C. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc. (Appeal from Jefferson Circuit Court: CV-00-2000.1).

NOTICE

Pursuant to Rule 34(a), Alabama Rules of Appellate Procedure, the request for oral argument is denied. This cause is submitted on briefs, December 16, 2004.

cc:
Hon. Helen Shores Lee, Circuit Judge
David R. Donaldson, Attorney
J. Dawn Stith, Attorney
Carl S. Burkhalter, Attorney
R. Allen Kilgore, Jr., Attorney